Invention will come to an end, because the things that are capable of invention by the human mind in its present stage of evolution will have been mostly invented; and I refer not only to inventions in the Arts and Sciences, but also to discoveries as to organization and methods of corporate and other business. When the discoveries have been made, it becomes comparatively easy to conduct a similar business on the new lines, and many people can be found who are capable of so doing. Many men can carry on a great executive department once established, and make minor improvements in the work, where only one could originally have organized it and set it going. And so, to concede that an executive department could not have developed a great industry in the first place does not necessarily involve a concession that it could not carry on that industry, upon lines developed by private enterprise, with no more than a negligible percentage of waste. By the middle of the twentieth century the world may have reached a condition comparatively static. If competitive conditions are then impossible, and state socialism seems the only alternative to a financial oligarchy, state socialism may appear to our children less impracticable and more tolerable than it does to us. From such an alternative in the future the advocates of governmental interference, without government ownership, are seeking an escape. Whether an escape by this road is possible or impossible can not be learned from the one sure teacher—experience—until further legislation has been tried.

THE REGULATION OF RAILWAY RATES.

HON. MARTIN A. KNAPP.

The purpose of this paper is merely to outline without elaboration the questions involved and the principles to be applied in the regulation of railway rates by public authority. If any argument is needed in support of the right and the duty of government control, it is found in an obvious and fundamental fact. Until modern discovery utilized steam as a motive power, the ordinary public road was the sole means of communication by land, the only pathway of internal com-

merce. Before this new agency was brought into service, while the old highways were yet exclusively employed, the right to their common use was nowhere doubted or denied. In recent times certainly—and this is the point of importance—the established roads, the strips of land set apart as ways of passage, have everywhere been regarded as common property, and the right to their common use has been the recognized and equal possession of every person.

But the transfer of land commerce to highways of steel, with the substitution of steam and electricity in the place of animal power, has not impaired the nature of this right or diminished in the least its inestimable value. On the contrary, there is no pursuit or employment which is not now more dependent than ever before upon the means provided for public transportation. The railroad has become the principal highway. For long-distance movement it has wholly supplanted the public road, yet it performs on a much greater scale the same governmental function and meets the same increasing and indispensable need. Hence, the railway of to-day, this wonderful vehicle of modern commerce, has become the chief factor of industrial life, the *sine qua non* of its power and progress, the primary condition on which individual opportunity and welfare continually depend. The right to just and equal charges for railway service springs therefore from the nature and necessities of social order. The railroads are an agency of the state for discharging a public duty of the highest utility. The right to use their facilities, like the right to the common highway, is an inherent and inalienable right the very essence of which is equality.

To secure the full enjoyment of this right, to enforce reasonableness and impartiality in the conduct and charges of railway carriers, is the distinct and beneficent aim of all regulating measures. The ideal condition obtains when the facilities of transfer are furnished on fair and actually equal terms, so that no advantage to one person over another, or to one community or commodity over another, is gained or expected in the use or cost of the agencies of transportation.

Now, whatever plan is adopted for accomplishing this pur-

pose, it is evidently needful, as a practical measure, to provide at the outset a legal standard of compensation binding alike on those who furnish and those who employ the instrumentalities of public carriage. In other words, there must be a fixed and common rate, made known by suitable publication, which constitutes while it remains in force the measure of lawful charges. In the nature of the case, as it seems to me, this is necessarily the first step in the regulation of rates and charges.

Starting then with the standard legally established, whether by the carriers themselves as is now the case or by the exercise of public authority in the first instance, two difficulties at once arise. These difficulties are quite distinct in nature and differ widely as to the appropriate means by which they may be overcome. One relates to the measures for securing conformity to the standard rate, the other to the methods by which the standard itself may be changed or its reasonableness tested. These are practically unlike purposes. To accomplish them both requires efficient but dissimilar action. It is one thing to prevent the wrong-doing effected by granting to favored persons some discount from established charges, no matter in what way the preference may be secured; it is quite another thing to correct the wrong-doing which results from excessive or relatively unfair rates, though properly published and strictly enforced. This important distinction—between offenses like secret rebates and kindred practices on the one hand and injustice resulting from the operation of the published rate itself on the other—is frequently overlooked. For this reason doubtless there is much misconception both as to the provisions of existing laws and as to the power of Congress to legislate upon the subject.

The nature of the distinction here pointed out and the importance of its recognition are made apparent when once the practical aspects of the matter are clearly perceived. It must be evident upon reflection that the only effective mode of dealing with those discriminations between individuals which are effected by rate-cutting, rebates, underbilling and the like, *is to place them in the category of criminal misdemeanors.*

No other direct and suitable remedy can be provided by legislative enactment. Any redress for injuries of this sort through civil actions for damages, which is the only alternative, is manifestly of insignificant value. It neither affords compensation to those who have suffered nor does it operate with any force to prevent the recurrence of such misconduct. For offenses of this class are not the mere disregard of contract obligations; they are infringements of the common right and violations of unquestioned public duty. But when transgressions of this kind are made amenable to the criminal law, when the statute has impressed them with this penal character, they must be dealt with in the same manner and by the same agencies as other punishable offenses. As respects their prevention or the methods by which those who commit them may be prosecuted, they differ in no material respect from other misdemeanors. The ordinary machinery of the criminal law must be employed against those who transgress in this manner, and there is no other way by which penal provisions can be made effective.

It is scarcely necessary to observe that an administrative body, like the present Commission, is wholly without authority to prevent this species of discrimination. True, such a tribunal may be charged with the general duty of executing and enforcing the law; but it cannot be endowed with the power to punish delinquents or to otherwise administer the criminal remedies provided, except as it may aid prosecuting officers in procuring evidence against suspected parties. Plainly, if immunity is secured from these vicious practices it must be sought in the means devised for the enforcement of other criminal laws, and by the adoption of a legislative policy which will remove or minimize the inducement to criminal wrong-doing.

It is worthy of remark in this connection that these are preventable evils. They are the natural outgrowth of conditions and theories which have largely obtained in railway operations, but they are rapidly disappearing and will soon, I am sure, become as rare and as relatively unimportant as highway robbery and other like offenses. Their existence, to

the extent they may continue, will not be a serious element of the railroad problem, as their suppression is only an incidental feature of the task of regulation.

If these views are correct, it becomes apparent that the principal and permanent office of regulation concerns itself not with secret or prohibited departures from the public standard, however established, but with the reasonableness and justice of the standard itself and the means of bringing about its alteration whenever found excessive or inequitable. When the effort at government control was first undertaken, there were as now tariffs in general use which furnished, nominally at least, the basis for computing the carrier's charges. These rates are fixed by the railroads themselves and represent their notions of proper or obtainable remuneration. The great body of producers and consumers, whose interests are so vitally affected by the cost of transportation, and who are so completely dependent upon this public service, have no voice in determining these charges and little power to prevent exactions or inequality except as they may command the intervention of public authority. If the tariffs in current use are filed and published as the law now requires, and as any useful and workable law must necessarily require, they furnish a standard of charges *prima facie* lawful and binding both on the railroads and the public. So long as they are actually observed nobody presumably is injured and nobody at fault. But if those upon whom these rates are enforced complain that a given rate is too high or is relatively unjust, and that charge is denied by the carrier concerned, how is the controversy to be decided? Are railway managers themselves to be the sole judges of the reasonableness of their own rates? Are they to be the final arbiters of the just relation of rates between different commodities and different communities? To investigate these tariffs, made as they are for the most part by the railroads themselves and in their own interest, to compel their correction when found to be oppressive or unfair, to determine in such cases what are just and reasonable rates for public carriage, is a governmental function of the highest utility. This is the central idea of regulation and the per-

manent field of its usefulness. Some authority there should be, superior to and independent of the carrying corporations, to examine their schedules, prevent unjust exactions, and equalize so far as may be the burdens of transportation. More and more, as population increases and industries multiply, will these burdens demand unbiased scrutiny and equitable readjustment. To give each community the rightful advantages of location, to keep different commodities on an equal footing, so that each shall circulate freely and in natural volume, to make the avenues of distribution and exchange equally available to all producers, so that none shall be overweighted by discriminating rates or oppressive charges, to settle such controversies as may arise between the carriers and the public with due regard to the interests of both; all this, as it seems to me, is comprehended in the needs and aims of public regulation.

That legislation to this end is a valid and appropriate exercise of the constitutional power possessed by Congress has repeatedly been declared by the highest judicial authority.

In the notable case of Ames v. Union Pacific Railway Company (64 Fed. Rep., 178) Mr. Justice Brewer uses the following language:

"Within the term 'regulation' are embraced two ideas: One is the mere control of the operation of the roads, prescribing the rules for the management thereof—matters which affect the convenience of the public in their use. Regulation, in this sense, may be considered as purely public in its character, and in no manner trespassing upon the rights of the owners of railroads. But within the scope of the word 'regulation' as commonly used, is embraced the idea of fixing the compensation which the owners of railroad property shall receive for the use thereof."

Under this decision and others of equal significance, it may be regarded as definitely settled that, within limitations which preserve to the owners of railroad property the equal protection of the laws and prevent the taking of such property without due process of law, the power of Congress—either by direct action or through the medium of a commission—to prescribe from time to time the scale of charges for the carriage of interstate commerce is in every respect plenary

and exclusive. The wise exercise of that power within those limitations, for the purpose of enforcing transportation rates which are reasonable and relatively just, is at once the most important and the most needful in the whole field of national legislation.

Obviously, the investigation of published rates which are the subject of complaint and the alteration of the established standard, when that standard is found to be actually or relatively unjust, are matters unsuited to the application of penal statutes. The carrier which fixes in good faith and impartially applies a schedule of rates cannot be regarded as a criminal offender merely because that schedule is *believed or afterwards found to be excessive* in amount or prejudicial to one locality as compared with another. These are questions concerning which there may be and often is an honest difference of opinion, and until a new standard is in some way authoritatively fixed the collection of charges according to the old standard affords no ground upon which to base a criminal charge. The demands of justice in such cases would not be satisfied if criminal liability could be predicated upon the observance of a standard rate, although claimed to be unjust, before a new standard was in some way prescribed. In other words, there must be a proceeding in the nature of a judicial inquiry or the alteration of the open tariff by voluntary action or the exercise of public authority.

Nor can the correction of excessive or preferential rates be secured through the ordinary courts. Not only are their methods and rules—however necessary to safeguard the adjudication of private controversies—unsuited to the determination of public rights as affected by transportation charges, but the limitations upon their powers preclude them from granting the measure of relief which the nature of the case requires, and that is the substitution for future observance of a new standard of charges. If the rates in force are too high or relatively unjust, the only remedy of practical value is a reduced or readjusted schedule to be thereafter applied. But this involves the exercise of legislative authority which courts do not possess and with which, under our form of govern-

ment, they apparently cannot be endowed. Any substantial and adequate relief from inequitable rates must therefore be afforded through the medium of an administrative tribunal.

Such a tribunal, exercising by delegation some measure of the power vested in Congress, should have ample authority to determine in the first instance, and with at least the conclusiveness of a court of first instance, whether particular rates or practices, of which complaint is made and which are investigated upon notice and opportunity to be heard, are or are not in violation of the carrier's obligation to charge only reasonable and non-preferential rates. When such a question has been thus tried before that tribunal, its decision should stand as a rule of conduct prescribed by public authority and be observed as the just and legal standard of charges, unless a review thereof by the courts shall disclose some error which warrants judicial interference. It is not proposed that this tribunal shall establish schedules by arbitrary methods or be clothed with power to fix rates by *ex parte* orders; but it is proposed, when a given rate is complained of on the ground that it is excessive or relatively unjust, and that complaint has been examined upon due notice to the carrier and full opportunity to be heard, that the judgment of the tribunal in such case shall be binding upon all parties to the contention, unless judicial review finds cause for preventing its enforcement. The exercise of such authority when occasion requires is the only appropriate and adequate safeguard against unreasonable or discriminating charges. Not in the award of damages for past injuries but in the substitution of a new and juster standard of compensation will be found the sufficient and comprehensive remedy for the wrong-doing occasioned by unreasonable rates; and nothing short of this answers the purposes or meets the needs of public regulation. Congress has not undertaken, probably will not undertake, to prescribe by specific enactment what rates shall be charged by any road or on any article of traffic. As a practical matter, its power in this regard must be delegated to an official body which shall determine and prescribe the rates and rate relations to be put in place of those found to be unreasonably high or to operate

with discriminating effect. To guard against the abuse of such authority the action of the regulating body should be subject to judicial control under conditions suited to the nature of the controversy and designed to secure its just and speedy determination. In my judgment these are the principles which should govern the development of any suitable and sufficient scheme of railway regulation. If these principles are accepted their application becomes a matter of detail which the limits of this paper do not justify me in attempting to discuss.

One inference from these views, however, may be properly suggested. The evils which have attended the growth and operation of our railway systems, and which have given rise to so much public indignation, have their origin and inducement for the most part in the competition of carriers which our legislative policy seeks to enforce. That this is a mistaken and mischievous policy I am fully persuaded. So long as the competition between carriers remains unrestrained, just so long will it find expression, to an extent always serious and often alarming, in secret departures from the established standard and relative injustice in the standard itself. The power to compete is the power to discriminate, and it is simply out of the question to have at once the presence of competition and the absence of discrimination. To my mind the legislation which decrees that all rates shall be just and reasonable, and declares unlawful every discrimination between individuals or localities, is plainly inconsistent with competitive charges. The facts of experience and familiar knowledge demonstrate the error and futility of regulating laws which at once endeavor to make rate competition compulsory and at the same time condemn as criminal misdemeanors the acts and inducements by which in other spheres of activity competition is mainly effected. For this reason I advocate the legal sanction of associated action by rival carriers in the performance of their public functions. This is the one sensible and practicable plan, adapted to existing conditions and suited to the requirements of a public service. Such a policy would promote and invite the conduct of railway transportation in the manner most beneficial to the people and the railroads alike.

The true theory of public regulation, therefore, the theory which is best calculated to produce useful results, is to allow the railways to unite with each other in the discharge of their public duties, thereby making it feasible and for their interest to conform in all cases to their published schedules, and to invest the regulating body with authority, after investigation of complaints upon due notice and hearing, to condemn the rates found to be actually or relatively unreasonable and to prescribe, subject to judicial review, a substituted standard to be thereafter observed. If these views are correct and grounded in sound public policy, their speedy adoption will enlarge the benefits and promote the success of railway regulation.

DISCUSSION.

EDWARD P. RIPLEY: For nearly forty years I have had to do with the making of freight rates and the general relation of the public and the railroad. In this, as in all other details of trade and of transportation, there has been a constant process of evolution, which has been but little affected by attempts at legislative restriction or regulation.

Prior to 1880 the railroad was generally regarded as a private institution, operated by its owners purely for private gain, with but very ill-defined duties toward the public. Rates had been originally fixed just low enough to take the business as against wagon transportation, but had declined rapidly from that point by reason of competition between carriers, and because it had been discovered that, within certain limits, business could be stimulated and increased by reductions in rates. But there was natural hesitation about a wholesale reduction of tariffs, and it was found safer and easier to allow the nominal tariff to stand, and to make special rates as needed by refunding a portion of the charges upon certain shipments—and this was the origin of the so-called "rebate system."

Much as this system has been denounced, and many as were the abuses to which it lent itself, there were some things in its favor. A manufacturing establishment, for instance, located upon the line of one of our Western roads properly